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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William Caton
Acting Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: WT Docket No. 97-122; CC Docket No. 90-6

Dear Mr. Caton:

Herewith transmitted, on behalf of United States Cellular Corporation, are an original and four copies of its "Comments" in the above-referenced proceeding.

In the event there are any questions concerning this matter, please communicate with this office.

Very truly yours,

Peter M. Connolly

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Cellular Service and Other	)	
Commercial Mobile Radio	)	WT Docket No. 97-112
Services in the Gulf of	)	
Mexico	)	
	)	
Amendment of Part 22 of the	)	
Commission's Rules to Provide	)	CC Docket No. 90-6
for Unserved Areas in the	)	
Cellular Service and to Modify	)	
Other Cellular Rules	)	

COMMENTS OF UNITED STATES CELLULAR CORPORATION

United States Cellular Corporation ("USCC"), hereby files its comments in the above-captioned proceeding. USCC, a subsidiary of Telephone and Data Systems, Inc. ("TDS"), owns and/or operates cellular systems in 34 MSA and 103 RSA markets. Several of its markets, in Florida and Texas, border on the Gulf of Mexico. USCC, accordingly, has an important interest in a fair resolution of the issues involved in this proceeding.

I. Pending, And Grantable Applications Proposing Service Into the GMSA Coastal Zone Should Be Granted

USCC believes that the proposals made in the Notice of

Proposed Rulemaking in this proceeding[1] are, in general, reasonable. We believe that GMSA carriers should have an exclusive zone within which they can shift cell site locations to meet changing demands for offshore oil drilling and other services. And we consider it appropriate, given the many service areas close to the Gulf coastline, that the new Coastal Zone be created, which land and water based systems will be authorized to serve as is proposed at paragraphs 29-34 of the NPRM. Such an approach will promote the filing of applications to provide service to areas presently unserved along the Gulf Coast.

Achieving the maximum service to the public possible ought to be the Commission's guiding principle in this proceeding and accordingly USCC also supports the FCC's tentative decision to "grandfather" existing water-based sites operated by Gulf carriers in coastal waters and previously granted de minimis extensions from land-based carriers into the Gulf. See Paragraphs 35-36 of the NPRM. No legitimate public purpose would be served by requiring the discontinuance of such service.

However, in one respect, the rules proposed by the Commission are inconsistent with this central purpose. The FCC has proposed

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[1] See Second Further Notice of Proposed Rulemaking, FCC 91-110, released April 16, 1997 ("NPRM").

to dismiss all pending, but ungranted Phase II applications, filed by land-based carriers proposing service into what will become the Gulf Coastal Zone.[2] Such applications could be refiled but would be subject to licensing by auction in the event of new mutually exclusive filings.

USCC submits that this proposal is not fair to USCC in its individual circumstances and would also ultimately be found to be unlawful.

USCC acknowledges that, as the Commission points out, most Phase II applications by land-based cellular licensees seeking consent to extensions into the Gulf have been opposed by the GMSA licensees. On the non-wireline side, Petroleum Communications, Inc. ("PetroCom") filed petitions to deny every such post-1992 Phase II application of which we are aware, asserting a right to claim the entire Gulf as its CGSA. See NPRM, Paragraphs 23-25. And once such petitions were filed, the FCC took no action on the applications.

However, in 1996, PetroCom and USCC took constructive action to resolve this impasse at least applied to Florida RSAs 6 and 9, two of USCC's markets bordering on the Gulf. With respect to three

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[2] NPRM, Paragraphs 53-56

cell sites licensed to USCC subsidiaries in those markets, USCC reached agreements with PetroCom to the effect that the relevant USCC subsidiary would file for improved facilities and that the site would later be "dual licensed" with PetroCom, with an additional sector to be pointed at the Gulf. USCC duly filed the three applications, which were placed on public notice and were not opposed by PetroCom or anyone else and which did not attract mutually exclusive applications, and are thus now grantable.[3]

These cells were discussed with the Wireless Bureau and at each site operation with the improved facilities has been authorized by Special Temporary Authority since March, 1996 (Cedar Key, FL), October, 1996 (Gulf Hammock, FL) and September, 1996 (Panacea, FL) respectively.

Given the FCC's acceptance of the applications and their placement on public notice (without competing applications or petitions to deny), USCC anticipated that the applications would be granted and it would receive permanent authority for its

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[3] See, Applications of Florida RSA #8, Inc., filed July 17, 1996, Public Notice July 26, 1996 (File No. 04325-CL-P2-96) (Florida RSA #6-Cedar Key, FL); Florida RSA #8, Inc., filed November 13, 1996, Public Notice November 22, 1996, File No. 00700-CL-P2-97) (Florida RSA #6-Gulf Hammock, FL); USCOC of Florida RSA #9, Inc., filed September 12, 1996, Public Notice September 27, 1996, File No. 04992-CL-P2-96 (Florida RSA #9-Panacea, FL)

facilities. However, the Commission's proposal would require USCC to refile its applications, and run the risk again of petitions to deny, competing filings and possible auctions.

We submit that this is very unfair to USCC. If the FCC had wished to indicate to applicants that they could gain no "equities" from filing applications, it could simply have issued a public notice at the time of the remand in the Gulf court case[4] stating that it would not accept Phase II filings proposing service into the Gulf until the status of Gulf CGSAs was resolved.

The Commission now seeks to serve the same purpose by repeatedly stating in the NPRM that such accepted Phase II applications were "on hold" but that is a term without legal significance.

The FCC can and should at least grant those Phase II applications proposing service into the Gulf which are now unopposed and grantable because such grants would raise none of the "appearance of prejudgement" issues regarding the GMSA definition which granting contested applications might raise and to which the Commission alludes at Paragraph 56 of the NPRM. Such applications

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[4] See Petroleum Communications, Inc. v. FCC, No. 92-1670, and RVC Services, Inc., D/B/A Coastal Communications Co. v. FCC, No. 93-1016, 22 F.3d 1164, 1173 (D.C. Cir. 1994)

can be "grandfathered," as the FCC proposes to treat licensed facilities serving the Gulf.

II. Requiring USCC and Similarly Situated Applicants To Refile Their Applications Would Not Be Lawful

The NPRM contains little or no legal support for the idea that the FCC may simply dismiss ungranted and unopposed pending applications and require them to be refiled. However, if the FCC carries out its present intention with respect to those applications, it may have to defend its action in court, with reversal a likely outcome.

In the McElroy case[5] the D.C. Circuit held, contrary to the FCC's rulings, that those applicants which had filed unserved area applications after an initial applicable 30 day cut-off period had run for other, earlier filers, were not eligible to participate in the licensing lottery.

The court held that "timely filers who have diligently complied with the Commission's requirements have an equitable interest in the enforcement of the cut-off rules."[6] USCC has, we

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[5] McElroy Electronics Corp. v. FCC, 86 F.3d 248 (1996) (D.C. Cir. 1996)

[6] Id., at 257

submit, a similar equitable interest here.[7]

Moreover, in dismissing those pending applications, the FCC would be applying its new Coastal Zone rules to those applications retroactively, since by taking that action, the FCC would be "impairing rights" which USCC "possessed when it acted," which is one of the definitions of retroactive administrative action set forth in DIRECTV, Inc. v. FCC, 110 F.3d 816, 825-6 (D.C. Cir. 1997) (quoting Landgraf v. USI Film Products, 114 S. Ct. 1483, 1505 (1994)). That would be precisely the type of retroactive application of the law which is a clear threat to "[e]lementary conditions of fairness". Landgraf, 511 S. Ct., at 1497.

Further, the U.S. Court of Appeals for the D.C. Circuit has recently made it clear that what the FCC seeks to do here would

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[7] We would note that the interest here is actually even stronger than in McElroy. In that case, the FCC argued to the court that the relevant FCC public notices concerning the "fill-in" applications in question did not "cut-off" the rights of third parties because they did not contain the phrase "accepted for filing." Id., at 256-257. The Court of Appeals rejected that reasoning. However, the public notices in question here were the standard weekly public notices dealing with cellular major amendments and Phase II applications. Each of them contained the phrase "accepted for filing" regarding the applications listed. See, e.g. FCC Report No. CL-97-11, released November 22, 1996. It is thus difficult to see how the FCC can possibly square its own arguments in McElroy with its proposals here.

also be an unlawful attempt to apply a "legislative rule," that is, a rule adopted in a notice and comment proceeding, retroactively. As the court stated:

> "As we pointed out in Georgetown University Hospital v. Bowen, 821 F.2d 750, 757 (D.C. Cir. 1987), aff'd on other grounds, Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988):
>
> > '(The APA requires that legislative rules [i.e. rules adopted pursuant to the notice and comment procedures of the APA 5 U.S.C. § 553] be given future effect only. [Therefore] equitable considerations are irrelevant to the determination of whether the [agency's] rule may be applied retroactively; such retroactive application is foreclosed by the express terms of the APA.)'"
>
> Chadmoore Communications, Inc. v. FCC, D.C. Cir., Case No. 96-1061, released May 20, 1997, Slip. Op., at 6.

By applying its new rules to dismiss USCC's pending applications the FCC would contravene this doctrine, which it cannot and should not do.

We emphasize that our objections and objectives are limited. We acknowledge that it is permissible for the FCC to create a Coastal Zone and to decide among new mutually exclusive applications for areas previously unserved in that zone by means of competitive bidding. The FCC may also alter its signal propagation formulas which define mutual exclusivity in light of scientific evidence. But what it cannot do is allow applications to be filed under one set of rules, accept those applications for filing,

advise potential competitors and petitioners that they have thirty days to make filings and then, for reasons which are inapplicable to the unopposed applications, require that the applications be refiled. Accordingly, we ask that the FCC modify its policies to allow unopposed Phase II applications proposing service into the Gulf to be granted.

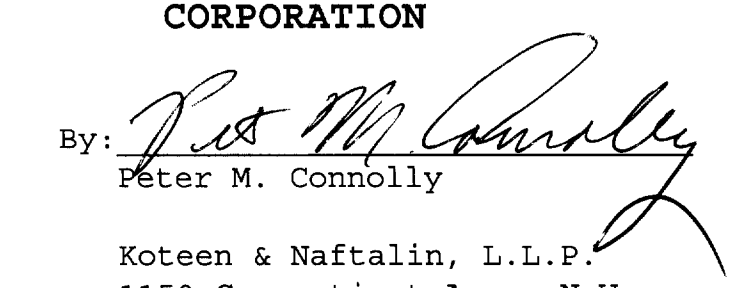
Conclusion

USCC believes that the FCC's proposals concerning the Gulf are generally reasonable.

However, as discussed and for the reasons given above, it requests that the FCC grant its pending and unopposed applications proposing service into the Gulf.

Respectfully submitted,

UNITED STATES CELLULAR CORPORATION

By: 
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July 2, 1997

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